Office-Supreme Court, U.S.
FILED
JUL 16 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

N[redacted] 152

AMPCO PRINTING-ADVERTISERS' OFFSET CORP., THE KATZ PARKING SYSTEM, INC. and THE GEORGIAN PRESS, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, ROBERT F. WAGNER, as Mayor of the City of New York, ABRAHAM D. BEAME, as Comptroller of said City, and HILDA G. SCHWARTZ, as Director of Finance of said City,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Appellee.

BRIEF OF ATTORNEY GENERAL INTERVENOR-APPELLEE

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LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Appellee.

BRIEF OF ATTORNEY GENERAL INTERVENOR-APPELLEE

Preliminary Statement

The appellants have appealed from a judgment of the Court of Appeals of the State of New York, dated February 20, 1964, unanimously affirming a judgment of the Supreme Court of the State of New York.

The opinion of the Court of Appeals is officially reported in 14 N. Y. 2d 11, 197 N. E. 2d 285, and is set forth in Appendix A of the appellants' jurisdictional statement. The opinion of the Supreme Court is reported in 41 Misc. 2d 371, 245 N.Y.S. 2d 121 and is set forth in the same Appendix A.

By this appeal the appellants challenge the constitutionality of Chapter 257 of the Laws of 1963 of the State of New York, the Enabling Act for the New York City Commercial Rent or Occupancy Tax, and the local law imposing such tax. The appellants contend that these laws violate Section One of the Fourteenth Amendment in that they arbitrarily and capriciously discriminate against appellants.

The City of New York *et al.*, defendants-appellees, have moved to dismiss this appeal on the ground that no substantial federal question is preesnted.

The Attorney General of the State of New York, intervenor-appellee, moves, joins in and supports the motion of the defendants-appellees to dismiss this appeal on the ground that no substantial federal question is presented.

Statutes Involved

Said Chapter 257 of the Laws of 1963 of the State of New York and said local law imposing the tax herein are set forth in Appendix C of appellants' jurisdictional statement.

Statement of the Case

This is an action brought by the appellants for a declaratory judgment declaring that the aforesaid State Enabling Act and the local law imposing the New York City Commercial Rent or Occupancy Tax were unconstitutional and invalid on the ground that they violated several provisions of the New York State Constitution and Section One of the

Fourteenth Amendment of the Constitution of the United States. The Attorney General of the State of New York was permitted to intervene pursuant to New York C.P.L.R. § 1012 (b) and New York Executive Law § 71 (McKinney's Bk. 18) on the ground that the constitutionality of a state statute (the Enabling Act) was involved. After issue was joined, all parties moved for summary judgment.

The State Supreme Court denied appellants' motion, granted appellees' motion, and declared that both the said Enabling Act and the local law are valid and constitutional. Upon a direct appeal the New York Court of Appeals unanimously affirmed.

For a statement of the facts, the Court is respectfully referred to the motion to dismiss this appeal filed by the defendants-appellees City of New York and City officials (Br. pp. 3-4).

Argument

A state may authorize a local tax which is applicable to private tenants occupying premises for carrying on any business or commercial activity, and such tax, measured by a percentage of the rent paid for such use or occupancy, does not violate the due process clause or the equal protection clause of the Fourteenth Amendment merely because it is inapplicable to the City and to private owners of premises who may occupy them to carry on similar businesses or commercial activities and who are otherwise taxed. Nor are these constitutional provisions violated (a) because a lower rate of tax is applied to private tenants whose annual rent is $2,500 or less, or (b) because the tax does not apply to private residential tenants. There is no substantial federal question presented in this connection.

The appellants contend, in their jurisdictional statement, pages 7-10, that the New York City Commercial Rent or Occupancy Tax discriminates unconstitutionally against

them, in that such tax does not also apply to owners of business real estate.

However, owners are otherwise taxed. Different taxpayers may be taxed differently and a state may make or permit classifications for the purposes of taxation. *Walters* v. *City of St. Louis*, 347 U. S. 231 (1954); *Caskey Baking Co.* v. *Virginia*, 313 U. S. 117 (1941); *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938). As stated in the *Walters* case, *supra*, at page 237:

> "• • • Equal protection does not require identity of treatment. • • •"

As was further stated in the *Caskey* case, *supra*, at page 121:

> "• • • As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classifying businesses for taxation or impose any iron rule of equality. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. • • •".

It is believed that the proper rule is stated in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522 (1959), at page 526, as follows:

> "• • • When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. • • •"

Some may be taxed, though others are not. *New York Rapid Transit Corp.* v. *City of New York, supra; Allied Stores of Ohio, Inc.* v. *Bowers, supra; United States* v. *Department of Revenue of State of Illinois*, 371 U. S. 21 (1962), *affirming*, 202 F. Supp. 757 (N. D. Ill., 1962). Even competitors may be taxed, or not taxed, in different ways. *New York Rapid Transit Corp.* v. *City of New York, supra*, at page 580 (private rapid transit lines taxed, City rapid transit lines and taxicabs not taxed, permissible).

In *Rockwell Spring and Axle Co.* v. *Romulus Township*, 365 Mich. 632, 114 N. W. 2d 166 (Mich. Sup. Ct., 1962), the taxation of private lessees from a County airport, though private lessees from a State University airport were not taxed, was upheld by the Michigan court.

States and municipalities have traditionally directly taxed, substantially, the owners of real estate, and regardless of whether such owners have any income from the real estate. It is submitted that they may now turn around and tax lessees, who generally have, as such, heretofore been exempted. The ultimate burden of all such taxes, if imposed on business premises, may be on the ultimate consumers. It is not necessarily the lessees who finally bear the burden.

Tenants presumably have elected to be such because they did not wish to bear the direct burdens and risks of ownership, even though the landlord's profits may be part of their costs of doing so. The State has now permitted the City to add another cost of leasing.

Because of State constitutional limitations on further direct taxation of real estate owners, the State has now permitted the respondent City, rather than add additional direct burdens upon owners, to tax lessees. Owners, if they fail to pay their real estate taxes, through lack of income or otherwise, face the loss of their property, which may be substantial. In depression times, or in the case of an unsuccessful business operation, this may often occur.

It has not been shown that owners are always favored in the entire scheme of State and local taxation.

The Court is respectfully referred to the numerous cases cited by the Corporation Counsl in his motion, sustaining the validity of this tax.

This tax is constitutional and no substantial federal question is presented by this appeal. See *Vaughan* v. *State of New York*, 272 N. Y. 102, 5 N. E. 2d 53 (1936), *appeal dismissed for want of a substantial federal question*, 300 U. S 638 (1937).

CONCLUSION

The appeal from the judgment of the Court of Appeals of the State of New York should be dismissed.

Dated: New York, New York, July 13, 1964.

Respectfully submitted,

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